* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ C.S. (OS) No. 785/1997

28th October, 2009.

M/S. PT. MUNSHI RAM & ASSOCIATES (P) LTD. ..Petitioner

Through: Mr. Debashish Moitra, Advocate.

VERSUS

RITES AND ANOTHER ...Respondent

Through: Mr. Anil Airi, Advocate with Ms. Sadhna Sharma, Advocate and Ms. Neha Kapur, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

%

JUDGMENT (ORAL)

I.A. No.4200/98 in CS(OS) No.785A/1997

1. This case has a long and chequered history. The contract is of the year 1991 and which was completed in the year 1993. The award

was passed in the year 1997. Objections of the respondent were first allowed on 15.11.2006 by remitting the matter to the Arbitrator for passing a reasoned Award. This judgment of a Learned Single Judge of this Court was set aside by the Division Bench of this Court vide order dated 28.7.2009 in FAO(OS) No.714/06 which the Division Bench remanded the matter for hearing of the objections afresh in accordance with law. That is how the matter has come up before me for hearing and disposal. It has taken therefore over sixteen years when the journey began on the contract having been completed on 30.6.1993.

2. This application contains the objections under Sections 30 and 33 of the Arbitration Act, 1940 to the award dated 30.3.1997 passed by the sole Arbitrator. The disputes which arose between the parties pertain to the contract awarded to the petitioner by the objector for the construction of 28 type II and 24 type III quarters at INA colony, New Delhi.

3. By the impugned award the Arbitrator has allowed and disallowed certain claims. I will take up each claim which has been

allowed by the Arbitrator and which has been objected to by the objector in seriatim.

4. The first claim made by the petitioner before the Arbitrator being claim No.1 pertained to the claim for work done. Whereas the contention of the objector was that the final bill containing the measurement as also the details of the deviation permissible under clause 12A of the contract were contained in the final bill, the petitioner, however, contended that his final bill which was subsequently given in September, 1993 ought to have been accepted by the Arbitrator. If one sees the discussion with respect to claim No.1 as given by the Arbitrator, it is noted that the Arbitrator has accepted the contention of the objector that the value and the recording of the measurement in the final bill dated 16th March, 1995 prepared by the objector ought to be accepted. The final value of this bill was Rs.1,17,62,877/-. The Arbitrator has specifically taken this bill as the basis, meaning thereby, he has accepted finality with respect to the final bill as prepared by the objector and meaning thereby the final bill prepared by the contractor has been rejected. The contention,

therefore, of the petitioner that he was not bound by the final bill and it was validly retracted by it has not been accepted by the Arbitrator. These findings are pure finding of facts and sitting as a Court, hearing objections under Sections 30 and 33 of the Arbitration Act, 1940, I cannot go into the reasoning of the reasons or the finding of facts as arrived at by the Arbitrator which are not perverse. I do not find any perversity in this finding of acceptance of the final bill as prepared by the objector of Rs.1,17,62,877/-. The claim therefore awarded under this head of Rs.4.65 lacs (as against the claim of Rs.7 lacs) in my opinion, is not justified because once the Arbitrator has held that the final bill as prepared by the objector is correct and which final bill surely contains the details of the deviations also there remains no scope thereafter for invoking Clause 12A for giving claims of deviation and other measurements as claimed by the contractor. This objection to the Award is well merited and deserves acceptance otherwise these would result inconsistent findings qua claim No.1 as decided by the Arbitrator.

5. The other claims which have been awarded by the Arbitrator are with respect to the disentitlement of recovery made by the objector for rebate in payments of monthly RA bills and the final bill, meaning thereby, contractor has been awarded the claim made for wrongful recoveries made by the objector. Claim No.4 is for rebate of the monthly bills and claim No.5 is for rebate towards the final bill. With regard to the claim made for the monthly bills, I find that the award of the Arbitrator in this regard is clearly faulty and the Arbitrator has mis-conducted himself and the proceedings. This is because the contractual clause 8 between the parties clearly requires that the contractor should approach the Engineer for taking measurements and for preparing the bills. There is no finding of fact by the Arbitrator that the bills in question were got prepared in time and were submitted in time. That being the position, there does not arise any justification for not giving the rebate as claimed by the objector as it cannot be said that the RA Bills have not been paid in time. Since the monthly bills were not got prepared in time and it was the duty of the contractor to seek to get the measurements done and submit bills of payment and if that has not been done, there is no reason why the objector should

not be entitled to benefit of the rebate as it is not at all established that payment of the monthly bills has not been made beyond time. The award being against the contractual provisions, i.e. clause 8 and para 1 of the Letter of Award dated 27.3.1991 cannot therefore be sustained so far as the grant of recoveries made for timely payment of R.A. bills. The other claim with respect to the rebate is for the payment under the final bill. As per the contract in question, viz para 2 of the letter of the award dated 27.3.1991, the same clearly specifies that 1% rebate on the final bill will be allowed to the objector only if the payment is made within four months from the date of physical completion of the work. I note in page 4 of the award while dealing with the claim No.5, the Arbitrator has accepted that the work was completed on 30.6.1993. The payment of the final bill in this case has been made as per the objector on 16.3.1995. Clearly, that is well beyond four months of the physical completion of the work and therefore the objector is not entitled to any rebate in the payment of the final bill and the total amount in the final bill dated 16.3.1995 shall become payable to the contractor. No fault can thus be found as regards claim No.5 allowed by the Award.

6. The next claim which has been strenuously argued and which is of a substantial amount is claim No.8. This claim which has been made by the contractor pertains to claim for escalation under clause 10CC of the contract. If we refer to clause 10 of the contract, it clearly specifies that this clause will not apply if the stipulated period for completion of the contract is 12 months or less. Admittedly, the stipulated period of completion of this contract was 12 months vis from 6.4.1991 to 5.4.1992. The contractual clause is therefore very clear that within a period of 12 months it is the contractor who will have to absorb any increase of cost towards the labour or the material component. The contractor had to submit his tender accordingly and therefore, now, he cannot say that even for the period of 12 months he will be entitled to escalation in the costs of labour and the material inputs. This part of the Award is also against contractual stipulation and thus cannot be sustained. That takes me to the issue that whether the contractor is at all entitled to any amount for this escalation. The facts in the present case as found by the Arbitrator are that the objector has been found guilty of delay in performance of the contract and it is for this reason that the objector was forced to extend the

period of completion without levying of any penalty/liquidated damages upon the contractor. That being so, the contractor shall definitely be entitled to payment in terms of clause 10CC beyond the period of 12 months and till completion of the work. In the present case, the extended period of completion is from 6.4.1992 till 30th June, 1993. Therefore, the escalation amount will have to be reduced accordingly. It is not possible for this Court to compute and calculate such an amount because the award entitles the contractor for complete escalation even during the period of contract and which finding has been set aside in the earlier part of this para. Accordingly, so far as this claim No.8 is concerned, the award needs to be remitted back to the Arbitrator to reduce the claim awarded under claim No.8 (which has been granted for the entire period of contract) by restricting it only to the period beyond the original 12 months contractual period. To make it more clear the contractor will be entitled to escalation only from 6.4.1992 to 30.6.1993. This may be recalculated by the Arbitrator and for which purpose the matter is being remitted back to the Arbitrator under Section 16 of the Arbitration Act 1940.

7. The next set of claims which have been awarded by the Arbitrator are claim Nos. 10 and 16 for interest. I note that so far as claim No.10 is concerned, the same has been allowed at Rs.9,09,918/-. This is done by awarding interest @ 18% per annum. I may note that it has been the contention of the counsel for the objector that the claim with regard to this head, claim No.10, as originally filed was not towards breach of contract by the respondent and under which head it has been allowed by the Arbitrator. The Arbitrator has however suo moto changed this claim and granted interest with respect to the alleged breach of contract by the respondent. However, in sum and substance, this claim in any case is for interest and ultimately whatever will be allowed by this Court after the final net positioning, the award of interest will be considered at that stage.

8. I now come therefore to claims No.13 to 15 which have been awarded in favour of the contractor by the Arbitrator. All these claims pertain to idling charges towards labour, plant and machinery/tools and plants during the original contract period as well as beyond the period of original contract. For the original period of

contract the claim is claim No.15 and for the period beyond the original period of contract the claims are claim Nos. 13 and 14. So far as the claim No.15 is concerned, I clearly find that the Arbitrator has mis-conducted himself and the proceedings. This is because during the period of contract when there is no specific clause giving any increase of charges towards idle tools and plants and labour, I fail to understand how can the Arbitrator can grant such a claim which will be wholly unreasonable, perverse and beyond the contractual provisions. Once the contract is being performed during the contractual period where arises any delay having been caused in performance by the objector for awarding of alleged expenditure towards idle labour and tools and plant. Within the original contractual period obviously there is no delay and the objector cannot be fastened with any liability on this Court. However, so far as claim Nos.13 and 14 are concerned the claims are justified because these claims are claims towards idle staff and plant and machinery incurred by the contractor beyond the original contractual period and it is because the delays caused by the objector that the period of extension had to be granted without imposition of any penalty on the

contractor. Therefore, the claim which was made for a total sum of Rs.18,00,000/- and Rs.2.5 lacs viz. Rs. 20.5 lacs and which has only been awarded at Rs.6.6 lacs by the Arbitrator is a finding of fact and is justified. It has been contended by the objector that the petitioner has not discharged the onus of proof and that there is no sufficient evidence worthy of acceptance before the Arbitrator to award such an amount. I note that the Arbitrator is entitled to arrive at a reasonable finding of facts by making an honest guesstimate by analysing the extent of evidence before him. It has been regularly and repeatedly laid down in various judgments including of Supreme Court that the Arbitrator will be entitled to make an honest guess work as he is an expert in the job and which judgments are reported as ***Mohd. Salamatullah Vs. Government of Andhra Pradesh AIR 1977 SC 1481 and Dwarika Dass Vs. State of Madhya Pradesh, 1999(3) SCC 500*** . I may note that the Arbitrator in this case is a technical person, namely, retired Director General of Works of CPWD. Accordingly, I do not find any fault with regard to this claim of Rs.6.6 lacs which has been awarded by the Arbitrator and which is against the claimed figure under this head of Rs.20.5 lacs. At this stage, it is canvassed by the

objector that claim No.13 is for the overall period and not the extended period only. However, I do not find that much need be said about this because afterall the claim was for Rs.18 lacs and what has been awarded by the Arbitrator is only a sum of Rs.6.60 lacs therefore the equities and the alleged inequities are clearly balanced out by reducing this particular amount.

9. That leaves me with regard to the issue of interest to be awarded for the various claims which the contractor is entitled to. In the recent line of judgments, the Supreme Court has said that the Courts must be alive to the changed economic scenario whereby after liberalization of the economy there has been a consistent fall in the rates of interest throughout the country. There was a time when the rates of interest charged by the nationalized banks ran as high as 18% to 24% per annum and that too with quarterly rests. Today the rates of interest have almost fallen down to 1/3rd or 40% of the level. Accordingly considering the judgments of the Supreme Court reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.2005 (6) 678, McDermott International Inc. Vs. Burn Standard Co. Ltd.& ors 2006 (11) SCC 181, Rajasthan*

*State Road Transport Corpn. Vs. Indag Rubber Ltd. (2006) 7 SCC 700 and Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra, 2007 (2) SCC 720*, I hold that the contractor will be entitled to interest @ 9% per annum on the amount which has been awarded as per the award and as modified/altered by me by the present judgment. So far as the amount for which recalculation has to be done by the Arbitrator and for which the matter has to be remitted back to the Arbitrator, the Arbitrator may award such rate of interest as he thinks fit, keeping in view the aforesaid judgments of the Supreme Court as stated above. Accordingly, this objection petition is partly allowed to the extent as stated above. With regard to the re-calculation of the amount under claim No.8, this matter is remitted back to the Arbitrator under section 16 of the Arbitration Act, 1940.

10. I am at this stage informed that the Arbitrator who passed the award i.e. Mr. G.S. Rao has sadly passed away. Accordingly, a fresh Arbitrator will have to be appointed for the purpose of deciding the issue with regard to re-calculation of the portion of the award which is remitted back to the Arbitrator. I, therefore, appoint Sh. G.P. Thareja resident of B-201, Priyadarshani Appartments, Patparjang,

New Delhi, Phone No.20906899 for the purpose of re-calculation as regards claim No.8. The fees of the Arbitrator is fixed at Rs.55,000/- which shall be equally shared by the parties.

11. With these observations, the present petition is disposed of. The award dated 30.3.1997 is made Rule of the Court to the extent the objections have been disallowed and the Award sustained and as modified by the present judgment and as regards the claim with regard to balance calculation, the matter is remitted back to the Arbitrator for reconsideration and recalculation under claim No.8. The Arbitrator will decide the proceedings in accordance with the law after giving due hearing to both the parties. The Arbitration record which is in this Court be sent to the Arbitrator by a special messenger alongwith a copy of this order.

VALMIKI J.MEHTA, J

October 28, 2009

Dkg/Ne